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No. 90-1399

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY
and RICHARD PERRY,
Petitioners,

v.

LUCY R. TURNER,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

The American Council of Life Insurance ("ACLI") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioners has consented to the filing of this brief; counsel for the respondent has refused consent.

The ACLI is the largest life insurance trade association in the United States, representing the interests of 616 member life insurance companies, 437 of which hold

licenses to conduct insurance business in Alabama. The ACLI's members currently hold 92.6 percent of the life insurance in force in legal reserve life insurance companies in the United States, as well as 92.6 percent of such insurance in Alabama.

The members of the ACLI are vitally concerned "about punitive damages that 'run wild.'" *Pacific Mutual Life Insurance Co. v. Haslip*, 59 U.S.L.W. 4157, 4161 (U.S. March 4, 1991). In recent years, courts have permitted juries to exercise broad discretion in assessing substantial punitive damages awards against insurance companies and have deferred to those awards even though they bear no rational relationship to the purposes of deterrence and punishment. These decisions, like the decision below, drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. The ACLI is, therefore, genuinely interested in the issue in this case—whether the excessive punitive damages award against the petitioners violates the Due Process Clause because the Alabama Supreme Court failed to conduct the independent and meaningful post-verdict review that this Court sanctioned in *Pacific Mutual*.

Given its nationwide constituency, the ACLI is uniquely able to provide this Court with the views of the life insurance industry concerning the issue in this case and the impact of the decision below, if left undisturbed, on insurers. Because of its genuine interest in the constitutionality of punitive damages awards and because of the recent explosion in both the size and numbers of those awards, the ACLI has filed numerous *amicus* briefs in this Court in other cases involving the constitutionality of punitive damages awards. *See, e.g.*, *Pacific Mutual Life Insurance Co. v. Haslip*, 59 U.S.L.W. 4157 (U.S. March 4, 1991); *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bank-*

ers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the Petition.

Respectfully submitted,

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April 1991

QUESTION PRESENTED

Whether the $499,000 punitive damages award against the petitioners violates the Due Process Clause of the Constitution because the Alabama Supreme Court failed to apply the post-verdict appellate review procedures, which this Court sanctioned in *Pacific Mutual Life Insurance Co. v. Haslip*, 59 U.S.L.W. 4157 (U.S. March 4, 1991), to determine whether the award—nearly 500 times the respondent's compensatory damages—was constitutionally excessive.

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BRIEF AMICUS CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

As stated in the motion accompanying this brief, the American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of 616 member life insurance companies, 437 of which hold licenses to conduct insurance business in Alabama. The ACLI's members currently hold 92.6 percent of the life insurance in force in legal reserve life insurance companies in the United States and in Alabama. The ACLI files this brief to pro-

vide the Court with its unique perspective, based on the experience of its broad-based constituency, on the constitutionality of the punitive damages award in this case and to offer additional arguments that underscore the importance of granting the Petition.

STATEMENT

This case involves a constitutional challenge to an award of $499,000 in punitive damages against Petitioners, Southern Life and Health Insurance Company ("Southern Life") and its agent, Richard Perry, based on the agent's alleged fraud in connection with a $1,500 life insurance policy. The Petitioners' Statement of the Case recites the essential facts and the conclusions of the courts below; accordingly, the *amicus* will not repeat them here.

REASONS FOR GRANTING THE WRIT

THE ALABAMA SUPREME COURT SUSTAINED THE EXCESSIVE PUNITIVE DAMAGES AWARD IN THIS CASE WITHOUT CONDUCTING THE INDEPENDENT AND MEANINGFUL POST-VERDICT REVIEW THAT THIS COURT DEEMED CONSTITUTIONALLY COMPELLING IN *PACIFIC MUTUAL LIFE INSURANCE COMPANY v. HASLIP*

Had the Alabama Supreme Court subjected the $499,000 punitive damages award against Southern Life to the "additional check" that this Court sanctioned in *Pacific Mutual Life Insurance Co. v. Haslip*, 59 U.S.L.W. 4157, 4162 (U.S. March 4, 1991), this case might have ended, perhaps unremarkably, in the Alabama Supreme Court. But this case is not unremarkable: the Alabama Supreme Court sustained a punitive damages award nearly 500 times the respondent's compensatory damages of $1,000, without subjecting it to any meaningful post-verdict appellate review. The substantial punitive damages award in this case starkly demonstrates that failed

review procedures, and non-existent review procedures, "invite extreme results that jar one's constitutional sensibilities." *Id.* at 4161.

1. In *Pacific Mutual*, this Court recognized that the Due Process Clause imposes limitations on jury—and judicial—discretion in assessing and affirming punitive damages. While the Court declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" (59 U.S.L.W. at 4161), the Court concluded that the punitive damages award in that case passed constitutional muster. The Court did so because Alabama's three-tiered procedures, as applied in *Pacific Mutual*, produced an award that properly accommodated both the State's interests in deterrence and punishment and the defendant's interest in rational decisionmaking: *first*, the jury received appropriate guidance through jury instructions that explained the purposes of punitive damages; *second*, the trial court conducted a post-verdict review of the jury's award consistent with the factors set forth in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); and, *third*, the Alabama Supreme Court provided an "additional check" on the trial court's discretion with a "comparative analysis" of other awards and an independent substantive analysis under *Hammond* and *Hornsby*. *See Pacific Mutual*, 59 U.S.L.W. at 4161-62. Thus, the Court concluded that Pacific Mutual "had the benefit of the full panoply of Alabama's procedural protections" (*id.* at 4162)—protections that distinguished Alabama's common law procedures from the less rigorous procedures existing in many other states (*id.* at 4162 n.10)—and that the award did not violate the Due Process Clause even though it was four times the amount of compensatory damages (*id.* at 4163).[1]

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[1] In sustaining Alabama's common law procedures for assessing punitive damages, the Court concluded that the long history of

The Court, however, recognized that the standards for post-verdict appellate review can only have "real effect *when applied* by the Alabama Supreme Court to jury awards." *Pacific Mutual*, 59 U.S.L.W. at 4162 (emphasis added). The Court made clear that—when applied by the Alabama Supreme Court—those standards "impose[] a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Id.* It also explained that—when applied by the Alabama Supreme Court—those standards "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* It thus requires no leap of faith to conclude that there is a very important distinction between enunciating standards and applying them, and that Alabama's enunciated standards can "ensure[] that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages" *only* "when applied." *Id.* at 4162.

2. That these standards were not applied, and thus had no such effect in this case, is indisputable. The Alabama Supreme Court undertook no "comparative analysis" (*Pacific Mutual*, 59 U.S.L.W. at 4162) of the jury's punitive damages award against Southern Life in this case. Had it done so, it may well have concluded that the punitive award—499 times the compensatory award of $1,000—was grossly disproportionate to similar awards

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punitive damages demonstrated that such common law procedures do not *per se* violate the Constitution. *See Pacific Mutual*, 59 U.S.L.W. at 4161. But it nonetheless made clear that it is equally "inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional" (*id.*), particularly in light of evidence that punitive damages have "run wild." *Id.* The wildly excessive punitive damages award in this case amply demonstrates how far punitive damages have been extrapolated beyond anything contemplated in their modest common law beginnings.

against insurance companies, based on similar conduct, in Alabama.[2]

The Alabama Supreme Court likewise undertook no "detailed substantive" (*Pacific Mutual*, 59 U.S.L.W. at 4162) analysis of the award in this case based on the *Hammond* factors. Concluding only that the evidence permitted the jury to punish Southern Life under the doctrine of *respondeat superior* (Pet. App. 9a-10a), the court below made no effort to determine:

- Whether the award rationally served the purposes of deterrence and punishment;
- Whether the award bore any rational relationship to the respondent's actual harm;
- Whether the award had any meaningful relationship to the severity of the petitioners' conduct or their financial position;
- Whether the award served to remove any profit that the petitioners had received from the conduct; or
- Whether the award bore any reasonable relationship to the respondent's litigation costs.

See Pacific Mutual, 59 U.S.L.W. at 4162 (summarizing factors set forth in *Hammond* and *Hornsby*). Had it

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[2] *See, e.g., Pacific Mutual Life Insurance Co. v. Haslip*, 553 So.2d 537 (Ala. 1989) (sustaining $840,000 punitive damages award for insurance fraud that was four times the compensatory award), *aff'd*, 59 U.S.L.W. 4157 (U.S. March 4, 1991); *State Farm Fire & Casualty Ins. Co. v. Lynn*, 516 So.2d 1373 (Ala. 1987) (sustaining $250,000 punitive damages award for insurance fraud that was about 12 times the compensatory award); *North Carolina Mutual Life Insurance Co. v. Holley*, 533 So.2d 497, 506-07 (Ala. 1988) (sustaining $500,000 punitive damages award for insurance fraud that was 250 times the compensatory damages); *but cf. Health-America v. Menton*, 551 So.2d 235, 247 (Ala. 1989), *cert. denied*, 110 S. Ct. 1166 (1990) (sustaining $1.8 million punitive damages award against health maintenance organization that was about 750 times the compensatory award).

done so, the Alabama Supreme Court presumably would not have sustained a punitive damages award that bears no rational relationship to the purposes of deterrence and punishment and that so clearly "cross[es] the line into the area of constitutional impropriety." *Id.* at 4163.[3]

The Alabama Supreme Court's review, in essence, was little more than a "rubber stamp" of the trial court's assessment of punitive damages. Unlike the insurer in *Pacific Mutual*, Southern Life did not have "the benefit of the full panoply of Alabama's procedural protections" (*Pacific Mutual*, 59 U.S.L.W. at 4163): it did not receive the benefit of a meaningful review in the Alabama Supreme Court that "brought to bear all relevant factors recited in" *Hammond* and *Hornsby*. *Id.* at 4163. This was a denial of due process, and only this Court can correct the error.

The "procedures" afforded Southern Life in this case are, for constitutional purposes, indistinguishable from the procedures afforded to defendants under the common law schemes in many other states. The schemes in those states, no differently than the "procedure" that the trial court applied and the Alabama Supreme Court affirmed here, allow courts to modify or reverse punitive damages awards that evince jury "passion, bias and prejudice"—

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[3] Of course, the Alabama Supreme Court may well have been hampered by the trial court's haphazard application of the *Hammond* analysis. While the trial court did purport to conduct a post-verdict review of the award—and even remitted the original $5,000,000 award that was nearly 5,000 times the compensatory award—it apparently considered very few of the *Hammond* factors. It relied instead on the same factors that it instructed the jury to consider, namely, "the enormity of the wrong, the culpability of the wrongdoers, and the necessity for preventing similar wrongs in the future." Pet. App. 18a. Applying even that test, the trial court concluded that the award reflected the jury's improper bias, prejudice and emotion and thus crossed the line of constitutional impropriety, particularly in light of the petitioners' actions that served to mitigate any harm to the respondent and counsel's outbursts that served to prejudice the jury. *Id.* at 18a-19a.

schemes that this Court carefully distinguished from the more substantive scheme that it deemed constitutional in *Pacific Mutual*, 59 U.S.L.W. at 4162 n.10. For this reason as well, this case presents a unique opportunity for this Court to provide guidance to courts in Alabama, and in many other states, concerning whether these less rigorous review procedures are constitutionally adequate to protect against arbitrary and excessive punitive damages awards.

3. This case also presents the Court with a compelling opportunity to emphasize to the Alabama courts, and courts in other jurisdictions, that it meant what it said in *Pacific Mutual*. This Court did not endorse, in *Pacific Mutual*, an illusory triad of procedural protections that the Alabama courts can freely disregard. The series of protections that the Court endorsed in that case can satisfy due process only if they are meaningfully applied.

The Alabama Supreme Court's "rubber stamp" approach to post-verdict appellate review of punitive damages awards—an approach so starkly evident in this case—is only a harbinger of things to come in Alabama. Despite the importance of meaningful appellate post-verdict review to this Court's constitutional analysis in *Pacific Mutual*, the Alabama Supreme Court has, in the days since that decision, demonstrated that its post-verdict review is hardly so meaningful. Indeed, in *Armstrong v. Roger's Outdoor Sports*, No. 88-1190 (Ala. March 8, 1991), the Alabama Supreme Court struck down those portions of Alabama's 1975 tort reform legislation that removed the presumption of correctness attaching to jury awards of punitive damages, holding that deference to the jury's assessment of punitive damages was constitutionally required. A few days later, in *Fuller v. Preferred Risk Life Insurance Co.*, Nos. 89-1405, 89-1453 (Ala. March 15, 1991), the Alabama Supreme Court showed the extent to which it intends to disregard this Court's decision in *Pacific Mutual*; it re-

iterated that "the jury has the constitutional authority to determine what amount, if any, of punitive damages is necessary to punish the defendant for wrongful conduct and to deter future conduct" and that the jury's "authority is not diminished by post-verdict review. . . ." *Fuller v. Preferred Risk Life Insurance Co.*, slip op. at 12.[4]

These recent Alabama Supreme Court decisions plainly undermine the independence and effectiveness of post-verdict review of punitive damages in Alabama. They show, in the apt words of Justice Maddox, that Alabama's post-verdict review procedure "do[es] not provide for an *independent review* of punitive damages awards." *Armstrong v. Roger's Outdoor Sports*, slip op. at 21 (Maddox, J., dissenting; emphasis in original). Indeed, the requirement of judicial deference to jury awards of punitive damages is, more than ever, a powerful antagonist to independent appellate review in Alabama. These decisions thus "show[] that the procedure [that this Court in *Pacific Mutual*] has just found 'ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages' is neither meaningful nor adequate to protect a defendant's 'due process' rights." *Id.* (footnote omitted), quoting *Pacific Mutual*, 59 U.S.L.W. at 4162.

These cases underscore the importance of granting the Petition in this case. This case of failed procedures portends serious consequences for litigants in the Alabama courts who, in the aftermath of *Pacific Mutual*, have every reason to expect—but no assurances of receiving—constitutional protections from excessive punitive damages awards. If left undisturbed, the decision below will

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[4] The *Armstrong* decision poses a real setback to legislative tort reform in Alabama and, in particular, to legislative efforts to modify common law procedures for assessing punitive damages. This legislative setback only underscores the importance of this Court's role in further defining the constitutional limits of punitive damages.

signal to the Alabama courts, and to courts and legislatures in states that have not yet adopted punitive damages reforms, that they need not take this Court at its word in *Pacific Mutual.* It will send the dangerous signal that post-verdict review procedures are only an illusory right that courts may disregard at will; that a "rubber stamp" approach to post-verdict review of punitive damages will suffice under the Due Process Clause even after *Pacific Mutual;* and that the presumption that the trial court's assessment of punitive damages is correct will virtually always override reasoned and rational post-verdict appellate review. Only this Court can reverse that signal and provide needed guidance to the courts and state legislatures that must strive to provide meaningful texture to the constitutional framework that the Court established in *Pacific Mutual.*

CONCLUSION

The petition for certiorari should be granted. In the event that the Court deems plenary review unnecessary, the Court should vacate and remand the judgment for reconsideration in light of the Court's decision in *Pacific Mutual.*

Respectfully submitted,

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